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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1585

UNITED STATES OF AMERICA, Petitioner

v.

RICHARD RUSSELL

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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INDEX

	Page
QUESTION PRESENTED	1
STATEMENT	1
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I. The Supplying by the Government Employee of the Indispensible Ingredient Without Which There Could be No Crime Constitutes a Due Process Violation	9
II. Under Traditional Principles of Entrapment, Respondent Was Entrapped as a Matter of Law	21
III. The Underlying Rationale for Entrapment Requires Focusing on the Conduct of the Government	25
CONCLUSION	31

CITATIONS

Cases:

Andrews v. United States, 162 U.S. 420	25
Aultman v. United States, 289 Fed. 251 (5th Cir. 1923)	25
Bates v. United States, 10 Fed. 92	25
Butts v. United States, 273 F.35 (8th Cir. 1921)	7
Elkins v. United States, 364 U.S. 206	19
Escobedo v. Illinois, 378 U.S. 478	19
Goode v. United States, 159 U.S. 663	24
Greene v. United States, 454 F.2d 783 (9th Cir. 1971)	15
Grimm v. United States, 156 U.S. 604	24
Lopez v. United States, 373 U.S. 427	8, 14, 27

Mapp v. Ohio, 367 U.S. 643 ..... 16, 19
Masciale v. United States, 356 U.S. 386 8
McNabb v. United States, 318 U.S. 332 30
Miranda v. Arizona, 384 U.S. 436 19
Osborne v. United States, 385 U.S. 323 13
People v. Strong, 21 Ill.2d 320, 172 N.E.2d 65 16
Price v. United States, 165 U.S. 311 25
Raley v. Ohio, 360 U.S. 423 18
Robinson v. California, 370 U.S. 660 29
Rosen v. United States, 161 U.S. 29 24
Sherman v. United States, 356 U.S. 369 ..... *passim*
Sorrells v. United States, 287 U.S. 435 ..... *passim*
State v. Boccelli, 105 Ariz. 495, 467 P.2d 740 16
State v. Sainz, Ct.App. New Mexico, September 29, 1972 16
United States v. Bueno, 447 F.2d 903 (5th Cir. 1971) 15
United States v. Chisum, 312 F.Supp. 1307 (C.D. Cal. 1970) 15
United States v. Dillet, 265 F.Supp. 980 (S.D.N.Y. 1966) 16
United States v. McGrath, ____F.2d ____(7th Cir. September 26, 1972) 15, 24
United States v. Reisenweber, 288 Fed. 520 (2nd Cir. 1923) 25
United States v. Silva, 180 F.Supp. 557 (S.D.N.Y. 1959) 16
United States v. Wade, 388 U.S. 218 19
Woo Wai v. United States, 223 Fed. 412 (9th Cir. 1915) 11

Statutes:

21 U.S.C. (1964 ed. Supp. V):

Sec. 331 (q)(1) 1, 2

Sec. 331 (q)(2) 2

Sec. 333 (b)(1) 1, 2

Sec. 360a(a) 1

Sec. 360a(b) 2

Miscellaneous:

DeFoe, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application 1* U.SanFran.L.Rev. 243 (1967) 11

Model Penal Code Proposed Official Draft, 1962 30

Proposed New Federal Criminal Code (1971), Final Report of the National Commission on Reform of Federal Criminal Laws 30

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the United States Government can both provide an indispensible element, without which there could be no crime, and then prosecute the person who has been furnished that indispensible element for the commission of the crime.

STATEMENT

The respondent, Richard Russell, along with two co-defendants, was indicted and convicted for the unlawful manufacture and delivery of methamphetamine, in violation of 21 U.S.C. 331 (q)(1), 360 a(a) and 333

(b)(1), and of having unlawfully sold and delivered that drug, in violation of 21 U.S.C. 331 (q)(2), 360 a(b) and 333 (b)(1). The indictment was in five counts but respondent was only charged in three. Patrick Connelly was convicted on all five counts; John Connelly was also named as a defendant but did not appear for trial. Neither Patrick nor John Connelly is involved in this appeal.

Both at the conclusion of the Government's case in chief and at the close of all the evidence, respondent moved for dismissal on the grounds that he had been entrapped as a matter of law (Tr. 114, 161)[1] and objected to the court's instruction on entrapment (Tr. 192).

On appeal, respondent's conviction was reversed by the Court of Appeals for the Ninth Circuit and the Indictment ordered dismissed. The appellate court held that respondent was entitled to dismissal as a matter of law because of the "intolerable degree of governmental participation in the criminal enterprise." That court held respondent was denied due process regardless of whether the traditional entrapment or traditional due process repugnance to overzealous law enforcement label was applied.

Most of the facts are not disputed. On or about December 7, 1969, an undercover agent of the Bureau of Narcotics and Dangerous Drugs, Joe Shapiro, met with all three defendants at the home of respondent. Shapiro represented himself as a member of a syndicate anxious

[1] "Pet.App." refers to the appendix to the petition for a writ of certiorari. "App." refers to the joint appendix in this Court; "Tr." refers to the transcript of proceedings at trial also on file with the Clerk.

to control the distribution of methamphetamines and volunteered to supply phenyl-2-propanone, a chemical necessary for the manufacture of the drug, in return for one-half of the methamphetamine produced, but first wanted to observe the place of manufacture, which was located in Patrick Connelly's home. This chemical was hard to obtain because, at the request of the Bureau of Narcotics and Dangerous Drugs, drug firms had taken it off the market. (App. 13, 14; Tr. 82). On the following day, December 8, 1969, respondent and Patrick Connolly attempted to purchase phenyl-2-propanone at a drug supply house but were unsuccessful (Tr. 17). On the evening of December 9, 1969, Shapiro met with Patrick Connelly and respondent at Patrick Connelly's home. Shapiro provided a bottle containing 100 grams of phenyl-2-propanone, which was used to manufacture methamphetamines that night (App. 8; Tr. 22). The extent to which Shapiro assisted the operation is somewhat cloudy, but Shapiro admits to placing several pieces of foil that had fallen to the floor in the flask. (App. 12, 13; Tr. 71, 87). Pursuant to his offer to supply the chemical, Shapiro received one-half of the drug produced. It was this manufacturing that formed the basis of the charges against respondent. Subsequently, Shapiro purchased some of respondent's portion of the drug for sixty dollars, and this sale formed one count of the Indictment.

It is undisputed that the chemical provided by Shapiro was used for the manufacture of the drug and the resultant sale for which respondent was convicted. Shapiro testified there was discussion on December 7, 1969 that respondent had no phenyl-2-propanone, and further that he saw no other phenyl-2-propanone on the premises on December 9, 1969 nor was there any

production of methamphetamines on December 8, 1969 (App. 14-15, Tr. 83-85).

So far as respondent is concerned, that ended his involvement in the case. Approximately one month later, on or about January 9, 1970, Shapiro met with Patrick Connelly concerning further transactions but respondent was not involved (App. 10, 11, Tr. 33, 34). Outside of the events of December 7-10, 1969, there was no evidence that respondent had been involved in any drug traffic or manufacturing, or that he was other than a law-abiding citizen. This is important because there is a dispute between petitioner and respondent about the extent of the evidence relating to respondent's involvement. As the Government's brief indicates, the evidence showed that Patrick Connolly had been involved in manufacturing since May, 1969 (Pet. brief, p. 3), but there is no evidence that respondent Russell had so done. Likewise, it was John Connolly who gave Shapiro a sample of the illegal drug and it is not established that respondent had anything to do with this, and the laboratory, such as it was, was located in Patrick Connolly's home. All this is important because the Government has accepted the erroneous factual conclusions of the dissenting judge below and asks this court to do likewise. There simply is no direct evidence that Richard Russell was able to acquire phenyl-2-propanone from any source other than the government employee, Shapiro. Indeed, as the evidence shows, respondent and Patrick Connolly had attempted to purchase this chemical but were unsuccessful (Tr. 17).

The evidence is clear that but for the voluntary proposal of Shapiro to supply phenyl-2-propanone, Richard Russell could not have committed the crime for which he was convicted. The Government apparently

believed this to be the case as the indictment charges the Connolly brothers, but not respondent with delivering methamphetamines on December 7, 1969 and Patrick Connolly only with such a delivery on January 7, 1970. The three counts of the indictment charging respondent were all alleged to have occurred on December 10, 1969.

It may be that an inference can be drawn that Richard Russell had a predisposition to sell and manufacture drugs. Respondent does not press the argument that there is *no* such evidence, but firmly asserts that it was of the most tenuous nature and illustrates the evils of the traditional views on entrapment.

Even, however, if the petitioner's version of respondent's predisposition is assumed to be true, the respondent was entrapped as a matter of law. For there is no escaping the fact that Richard Russell was only able to commit a crime on December 10, 1969, because the Government voluntarily supplied the indispensible ingredient.

SUMMARY OF ARGUMENT

This case presents a new problem that this Court has not passed upon. This problem is: to what extent this Court will sanction the activities of government law enforcement agents in creating crimes, in providing essential ingredients, without which there could be no crime. The prior decisions of this court, *Sorrells v. United States*, 287 U.S. 435 and *Sherman v. United States*, 356 U.S. 369, do not answer the problem because they were concerned with the historic embodiment of entrapment, solicitation or inducement. The majority opinions in those cases focused on the intent or predisposition of the defendant to commit a crime, when what the government

agent did was to provide the opportunity to do what the defendant already could do by himself. The present situation involves the government far further in crime, to the point of completing the link between the defendant's opportunity and the completed crime by supplying the indispensible missing element, in this case phenyl-2-propanone, without which all the respondent's desires to commit a crime would be insufficient. All the courts that have considered this new problem have condemned the government's actions.

This court has condemned the government's soliciting crime when such activity starts with the government; it must, consistently, deny the government the right to prosecute when agents go further than solicitation and provide the indispensible link without which there could be no crime to prosecute.

There are two elements in the governmental involvement in criminal cases: first during the investigative phase up to arrest and second, the prosecutive phase. If, in the first phase, the government fails to meet the applicable standards, it must be denied the right to proceed to the second or the second becomes a sham. Thus, when there is an illegal search and seizure in the investigative phase, the government is denied the right to introduce the fruits in the second. Likewise, where a confession is taken in an improper manner, it is inadmissible at trial. Likewise, where eyewitness identification is tainted, its introduction is restricted at trial. The true nature of the defense raised in this case is bottomed on the same due process considerations. The respondent only asks that this court condemn like activities of government agents. "It is not their [officers of the law] duty to incite to and create crime for the sole purpose of

prosecuting and punishing it. . . . *Butts v. United States*, 273 F. 35, 38 (8th Cir. 1921) as cited with approval in *Sorrells v. United States*, 287 U.S. 435, 444 (1932).

All courts have wrestled with the rationale of the entrapment defense. Yet, even under the traditional exposition of entrapment, as enunciated in *Sherman* and *Sorrells*, the respondent was clearly entrapped as a matter of law. In both those cases, the government manufactured the crime, as was the case here. For all the evidence here showed, the inability to acquire phenyl-2-propanone could well have discouraged Russell from proceeding further; the arrest of others for drug violations may have deterred Russell from further involvement; or the danger created in attempting to acquire phenyl-2-propanone created by the government's activities with the drug suppliers, could have deterred respondent. As this court stated in *Sherman*, "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly that function does not include the manufacturing of crime." 356 U.S. at 372. Likewise, this court in *Sorrells*, as cited in *Sherman*, stated ". . . entrapment occurs only when the criminal conduct was the product of the *creative* activity of law enforcement officials." (Emphasis by the court) 356 U.S. at 372.

Under the circumstances of this case, the views of the three concurring justices in *Sorrells*, and the four concurring justices in *Sherman* provide the proper rationale for entrapment.

In *Sherman*, at page 376, Mr. Chief Justice Warren stated in declining to reassess the doctrine of entrapment outlined in *Sorrells*, that the issue was not raised in the trial or appellate court, so ". . . ordinarily [the Court does not] decide issues not presented by the parties and there

is good reason not to vary that practice in this case."[2] This case affords the court a clear opportunity to undertake that reassessment, as the issue has been raised by respondent at every level, and accepted by the Court of Appeals.

The majority test for entrapment provides no guide for law enforcement officers or defendants; unfairly discriminates between defendants, not on their acts, but on the basis of their prior status; prejudices defendants from raising entrapment as a defense or exposes them to all kinds of hearsay, inuendo and suggestion by the prosecution ostensibly to show "predisposition", but which easily slides over as substantive evidence in a juror's mind that the defendant did the act for which he stands charged and leads courts into tortured reasoning to find entrapment. As this very court said at pages 375-6 of *Sherman v. United States*, 356 U.S. 369, a case where entrapment was found as a matter of law:

> "However, a nine-year old sales conviction and a five-year old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time Kalchinian [the informer] approached him, particularly when we must assume from the record he was trying to overcome the narcotics habit at the time."

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[2] A like notation is made in *Masciale v. United States*, 356 U.S. 386, footnote 5, decided the same day. A suggestion to reexamine the entire doctrine was also made in *Lopez v. United States*, 373 U.S. 427, 434.

ARGUMENT

I

THE SUPPLYING BY THE GOVERNMENT EMPLOYEE OF THE INDISPENSIBLE INGREDIENT WITHOUT WHICH THERE COULD BE NO CRIME CONSTITUTES A DUE PROCESS VIOLATION.

The respondent's main thesis is that the role of the government during the prearrest stage reveals a crucial difference from the prior cases considered by this Court and that due process requires an affirmance of the Court of Appeals.

If this Court is unwilling to examine the nature of the government agent's actions in this case, the result may well be simply another opinion on a factual analysis of whether the evidence of Richard Russell's "predisposition" to commit crimes of the nature for which he was charged was such that the trial judge should have decided as a matter of law that the defendant was entrapped. Unless the respondent can show this Court that the nature of the governmental action was of a qualitatively difficult nature than all the prior decisions, the opportunity afforded by the granting of the writ of certiorari will be substantially lessened.

The traditional entrapment defense, while now well established, has infrequently been considered by this Court and has resulted in constantly recurring problems based on the fact that the underlying rationale is uncertain and the courts, including this Court, have not been of one view as to which is the correct approach. The defense of entrapment can focus either 1—on the conduct of the government agent, in which event the question revolves around whether or not the law enforcement

officer has transgressed objectively set standards or 2—the innocence of the defendant, in which event the question becomes whether or not, as a subjective matter, the origin for the particular crime charged commenced with the defendant or was implanted in his mind by the government agent. It is these conflicting viewpoints that gave rise to the differing opinions of the majority and concurring justices in *Sorrells v. United States*, 287 U.S. 345 and *Sherman v. United States*, 356 U.S. 369. In the case at bar, however, other considerations are presented for this Court's opinion and it makes no difference which view is adopted.

Indeed, it is respondent's primary contention that the question presented by this case does not involve entrapment at all. The classic definition of entrapment was stated by Mr. Justice Roberts in his concurring opinion in *Sorrells v. United States*, 287 U.S. 435, wherein at page 454, he stated:

> "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer."

Although, as noted below, the respondent, in the alternative, argues that under the facts of this case entrapment under the above definition was established as a matter of law, the respondent believes that the more correct way to analyze the problem presented in this case is not to regard it as an entrapment case at all but to question whether the respondent received due process by the acts of the government agent in providing him with the indispensible chemical necessary to manufacture and thus deliver and sell methamphetamine. The respondent takes this position because he believes that an analysis of

the cases discussing entrapment indicate that the entrapment rationale is insufficient when the government agent provides the indispensible chemical, the counterfeit money, the illegal drug, to the very person who is then charged with a crime growing out of such transfer.

From its earliest federal expression in *Woo Wai v. United States*, 223 Fed. 412 (9th Cir. 1915), the doctrine of entrapment has been concerned with solicitation or inducement. In *Woo Wai*, a conviction for conspiracy to bribe immigration officers was reversed where the evidence showed that the defendant had been repeatedly solicited by other immigration officials to commit the illegal act. In that case, the court stated that entrapment was a good defense to a criminal charge because "A sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statute." *Woo Wai v. United States*, 223 Fed. 412 at 415. Thus in the federal courts, the defense of entrapment commenced its legal existence on the solicitation theory.[3]

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[3]The theoretical reason for the existence of the entrapment defense is not often articulated, but DeFeo in an article "Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application", 1 U.SanFran. L. Rev. 243, 250-1, explains the existence of the defense as growing out of the proliferation of statutory crimes, which he entitled "welfare offenses, no longer based on force, fraud or stealth [that] call forth no ready complaintant, as all involved are willing participants and cannot be expected to complain." As a result, the article argues, police officers had to use new and different methods to uncover the evidence of crimes. He concludes, "Viewed in historical perspective, the whole problem of entrapment has stemmed from a judicial reaction to the means used by police to achieve presence at such illegal transactions, either in person or through the agency of informers."

The first case to reach this court was, of course *Sorrells v. United States*, 287 U.S. 435. The Court in that case characterized the evidence at page 441 as follows:

> "It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent soliciation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War."

The evidence, therefore, showed a classic case for entrapment, which the court found should have been submitted to the jury. The majority found as its basis for this conclusion a principle of statutory construction—that the Congress did not intend that the class of persons who had been so solicited or induced would come within the class of people covered by the statute. The concurring opinion did not take issue with the solicitation aspect of the case; the difference involved a disagreement over the underlying rationale for entrapment. The concurring opinion stated that the correct rationale for entrapment was public policy and to protect the purity of the courts from being used in such an improper manner by governmental officials.

From this premise the concurring opinion concluded that under the supervisory power of the court, the trial judge should decide if the governmental conduct was improper and if so, find entrapment as a matter of law.

It was not until 1958 that this Court next had occasion to consider the entrapment problem, in *Sherman v. United States*, 356 U.S. 369. The Court was unanimous in reversing Sherman's conviction, holding as a matter of law that entrapment had been established. Mr. Chief Justice Warren, speaking for the Court, characterized the evidence as follows, at page 376:

> "The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The setup is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weakness of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this."

The majority held that, "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." 356 U.S. at 372. Speaking for four members of the court, Mr. Justice Frankfurter adopted the reasoning of the concurring opinion of Mr. Justice Roberts in *Sorrells*, that the activities of solicitation and inducement by the informer should not be tolerated by the court.

Since *Sherman*, this court has not fully considered the doctrine of entrapment again. In *Osborne v. United States*, 385 U.S. 323, a prosecution in which the defendant was convicted for attempting to bribe a member of a jury panel in a prospective criminal case, the

court dismissed petitioner's entrapment claims where the only showing he could make was that the informer had told petitioner, correctly, that one of the jury panel was the informer's cousin. The court stated, "at the most, Vick's [the informer] statement afforded the petitioner 'opportunities or facilities' for the commission of a criminal offense and that is a far cry from entrapment. [citing *Sherman* and *Sorrells*]" Likewise in *Lopez v. United States*, 373 U.S. 427, the court dismissed the defendant's claim of entrapment as insubstantial.

The cases of entrapment, it is therefore submitted, that have been considered by this Court have been limited to the question of solicitation or inducement. The situation at bar is considerably different and requires a different analysis. In the solicitation cases, the governmental function involves inducing the defendant to do what he was not previously disposed to do. Yet, in this case, assuming the defendant did have the intent to commit the act, the government went far further than providing Richard Russell with the opportunity to do the act—the government agent provided Russell with the only means by which Russell could complete the act of manufacturing, and thus delivering and selling. The United States Government, acting through its employee, has literally created a crime because it provided Richard Russell the missing link between whatever intent he had to commit a crime and the ability to carry out that desire. On the one hand, agents of the Bureau of Narcotics and Dangerous Drugs had gone to the drug supply houses and had requested that they cease dispensing phenyl-2-propanone, (App. 13, 14; Tr. 82) and then having dried up the supply, dangle that very chemical in front of the prospective defendant. It is this conduct which respondent asks this court to condemn.

He believes that there is a qualitative and quantitative difference between solicitation and the type of conduct proven here.

Respondent believes that the courts that have considered cases raising the factual problems presented here, have unanimously adopted respondent's view that the conduct of the government is such that a conviction is improper.[4] Respondent believes that the cases can best

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[4] *United States v. McGrath*, ____ F.2d ____ (7th Cir. September 26, 1972) pet. for writ of cert. filed No. 72-761, filed November 22, 1972, a case wherein the government supplied counterfeit paper currency to the defendant and then convicted him for the unlawful possession. Despite the defendant's conceded predisposition, the court held, "We find it repugnant to the most elemental notions of justice to permit law enforcement personnel to manufacture counterfeit bills, deliver them, and then arrest the recipient for possession of contraband. . . . more significantly, the harm to society derived from the agents' actions than from the defendant's."

United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), a case where the defendant, a narcotics addict, had been supplied with the illegal drug by the informer, that the defendant then delivered to the undercover agent. The court held, 447 F.2d at 906, "We hold that as a matter of law, if these facts be true, the Defendant cannot be convicted of the possession, handling and sale of the heroin."

Greene v. United States, 454 F.2d 783 (9th Cir. 1971); ". . . when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which renders entrapment repugnant to American criminal justice are operative."

United States v. Chisum, 312 F.Supp. 1307 (C.D. Cal. 1970) a case where a defendant volunteered he desired counterfeit currency and was arrested for possession of the same after the currency was delivered by an undercover government agent. "When the government supplies the contraband, the receipt of which is illegal, the government cannot be permitted to punish the one receiving it. To permit the government to do so would be to countenance violations of justice." 312 F.Supp. at 1312.

be analyzed and explained if the cases are considered from the due process point of view, rather than attempting to fit them into the traditional entrapment doctrine and, if that is true, that the appropriate due process analogy is in the Fourth Amendment exclusionary rules for search and seizure, and in the Fifth Amendment prohibition to the introduction of coerced confessions and self-incrimination, and the related Sixth Amendment exclusion of post indictment police line-ups held in the absence of counsel.

An analysis of the entrapment cases reveals a wide diversity of reasons as to why the various courts hold as they do. The respondent here respectfully suggests that what the courts find repugnant is the activity of the particular government agent involved—be it undercover agent or informer. It is the same problem that gave rise to the Bill or Rights and the proud heritage of the government of laws under which we operate—that is, the constant desire of the overzealous law enforcement officer to get the evidence from the defendant himself, thus obviating the long, difficult and time-consuming investigative work necessary for the successful prosecution of any case. As this Court concluded in another context in *Mapp v. Ohio*, 367 U.S. 643, 660:

> "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people

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Other District Court cases in accord are *United States v. Silva*, 180 F.Supp. 557 (S.D.N.Y. 1959) and *United States v. Dillet*, 265 F.Supp. 980 (S.D.N.Y. 1966).

The State cases are in agreement. *People v. Strong*, 21 Ill.2d 320, 172 N.E.2d 65; *State v. Boccelli*, 105 Ariz. 495, 467 P.2d 740; *State v. Sainz*, Ct.App. New Mexico, September 29, 1972.

rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by State officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment."

Indeed, there have been suggestions that the Due Process Clause of the Fifth Amendment is applicable in entrapment cases and the decisions of this Court. In *Sorrells v. United States*, 287 U.S. 435, in rejecting the arguments that entrapment is unavailable to a criminal defendant except in very narrowly confined areas, the court stated at page 446:

"It is manifest that these arguments [against the use of entrapment] rest entirely upon the letter of the statute. They take no account of the fact that its application in the circumstances under consideration is foreign to its purpose; *that such an application is so shocking to the sense of justice that it has been urged that it is the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its court.*" (Emphasis supplied)

Next, in *Sherman v. United States*, 356 U.S. 369, 373, the statement is made:

"Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, 'a different question is presented

when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.' 287 U.S. at 442. *The stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search.*" (Emphasis supplied)

It is this last analogy that respondent believes is applicable in the present case. Indeed, in a somewhat different context, this court has held that entrapment does violate the Due Process Caluse. In *Raley v. Ohio*, 360 U.S. 423, the Un-American Activities Commission of Ohio told certain witnesses that they were entitled to rely upon the State privilege against self-incrimination, the witnesses so did, but they were subsequently indicted and convicted for a refusal to answer certain questions put by the Committee. This court held, 360 U.S. at 425-6:

"We hold that in the circumstances of these cases, the judgments of the Ohio Supreme Court affirming the convictions violated the Due Process Clause of the Fourteenth Amendment except as to one conviction, as to which we are equally divided. After the Commission, speaking for the State, acted as it did, to sustain Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him."

The four justices, in their separate opinion did not take issue with that standard in holding that the one witness was not entrapped, as he had been directed specifically to answer the question put to him. This separate opinion stated, "In this posture of the facts

there could be no entrapment and hence no lack of due process." 360 U.S. at 445.

The evils that are sanctioned should this type of procedure be allowed promote disobedience of the laws in order to punish; encourage law enforcement officials to participate in crimes; permit unrestricted ability of overzealous law enforcement agents selectively to set up defendants for prosecution; result in a sham trial because the evidence has already been provided by the prosecution; countenance an effective violation of the Fifth Amendment right to self incrimination, as it makes the defendant supply evidence of his own guilt, thus effectively incriminating himself; and is an affront to basic notions of justice.

The same considerations apply here that led this Court to bring a halt to the "silver platter doctrine", *Elkins v. United States*, 364 U.S. 206; that applied the exclusionary rule of the Fourth Amendment to the states, *Mapp v. Ohio*, 367 U.S. 643; that ruled out the coerced confession, *Escobedo v. Illinois*, 378 U.S. 478, *Miranda v. Arizona*, 384 U.S. 436; and that governed the finding that the Sixth Amendment required the right to counsel at a post-indictment line up, *U.S. v. Wade*, 388 U.S. 218. As the court stated in *Mapp v. Ohio*, 367 U.S. 643 at page 659:

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly that its failure to observe its own laws, or worse, its disregard of the character of its own existence."

The respondent asks this court to condemn the practice wherein government agents provide the indispensible ingredients of crime and then prosecute those to

whom these ingredients have been furnished, as a violation of Due Process.

The only suggestion made by petitioner in its brief as to why these fundamental principles do not apply is the suggestion in a footnote, page 19-20, that it would be improper to expand these rights "to persons whose legitimate interests were *not* in fact violated." This statement, of course, assumes the answer, and if legitimate interests are invaded, the opposite conclusion must follow. Clearly, respondent had a legitimate interest, even assuming predisposition, in being afforded due process requirements that control government conduct.

If the respondent is correct in his analysis that Due Process considerations govern, the obvious proper analogy to determine whether or not Due Process has been violated is to find the analogy in other Due Process areas—search and seizure and coerced confessions—rather than to turn to the historic discussions of entrapment, which, has been pointed out, are not appropriate to the problem raised by this case. Petitioner, in its brief, has completely missed the point raised by respondent and accepted by the Court of Appeals below. The only argument made by the petitioner is that the cases upon which the Court of Appeals relied were wrongly decided and that the court below made an artificial exception to the usual rules. Yet respondent respectfully points out that the Government does in fact agree with respondent. At page 32 of its brief, the Government makes the following statement:

> "It may be that due process precludes criminal conviction for engaging in conduct that would not have been possible without the participation and

assistance of a government agent who supplied an indispensible means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels."

That is, simply put, the position of respondent. Whether or not the record supports that state of facts is, then, the matter of dispute between the petitioner and respondent. But assuming that it is found that (1) agent Shapiro supplied the phenyl-2-propanone which was used in the reaction on December 10, 1969; (2) that phenyl-2-propanone was hard to acquire due to the Government's efforts in suppressing the supply; (3) that phenyl-2-propanone was indispensible for the manufacturing of methamphetamine on December 10, 1969; and (4) that respondent was indicted for the manufacturing, possessing and distributing methamphetamine that resulted from the chemical reaction on December 10, 1969, all the considerations that are outlined by respondent above come into play because the factual record supports them.

II.

UNDER TRADITIONAL PRINCIPLES OF ENTRAPMENT, RESPONDENT WAS ENTRAPPED AS A MATTER OF LAW

In the alternative, it is clear that respondent was entrapped as a matter of law under even the rationale of the majority opinions of *Sorrells v. United States*, 287 U.S. 435 and *Sherman v. United States*, 356 U.S. 369. In *Sorrells*, 287 U.S. at 444-5, the opinion of the Court states:

"The federal courts have generally approved the statement of Circuit Judge Sanborn in the leading case of *Butts v. United States, supra*, [273 Fed. 35, 38 (8th Cir.)] as follows: 'The first duties of the officers of the law are to prevent, not to punish crime. *It is not their duty to incite to and create*

crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, pursuaded, and lured him to attempt to commit it.'" (Emphasis supplied)

There is not one bit of direct evidence in this case that Richard Russell had been in the past or could have been guilty of committing the crime charged without the active participation of the government agent, Shapiro. Richard Russell was never guilty and could not have been guilty had he not been inspired and lured by Shapiro. There can be no more undisputed aspect of this case. The petitioner attempts to tag Russell with prior activities of the Connolly brothers and the subsequent activity in January of John Connolly. The respondent challenges the petitioner to point to one place in the record where there is a showing that Richard Russell had ever been involved in any manufacturing, possessing or distributing illegal drugs.

Next, in *Sherman v. United States*, 356 U.S. 369, the well known quotation at page 372 appears:

"In *Sorrells v. United States*, 287 U.S. 435, this Court firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. . . .

> However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law enforcement officials (emphasis supplied). See 287 U.S. at 441, 451."

Regardless of whether we are here concerned with the manufacturing or creative aspect of the law enforcement involvement, there can be no question but that entrapment was established as a matter of law. The respondent agrees with the petitioner that undercover agents are necessary for the proper enforcement of crime; that stealth, artifice and strategem are necessary for adequate law enforcement. Where the respondent does take vigorous exception with petitioner, is in petitioner's view that the supplying of the indispensible ingredient for the manufacturing of methamphetamine is simply an isolated event, not very important and all that Shapiro was doing was "offering to supply one of the chemical ingredients. . . ." (Pet. Brief, p. 31) The petitioner is simply misreading the record in an attempt to avoid the obvious—the critical nature of the activities of the undercover agent in supplying the one drug that, without which, everything else was useless. As the court below noted:

> "While it is true that Russell and his co-defendants were supplied with only one ingredient of the illicit drug, that ingredient was as essential to the perpetuation of Russell's alleged crimes as was the heroin in *Bueno* and the counterfeit money in *Chisum*. Russell would have been powerless to 'commit' the charged offenses without the Government's pervasive intervention."

Likewise, as the court noted in *United States v. McGrath*, ____ F.2d ____ (7th Cir. September 26, 1972), "Accordingly, the rationale of *Sorrells*, where the Government apparently engineered the crime, applies equally to a situation where the Government itself performs essential parts of a criminal offense that might not otherwise have been committed."

In the court below, the government contended that respondent could not avail himself of the entrapment argument because of his predisposition, whatever that was, precluded raising the defense. No case, however, to respondent's knowledge so holds in circumstances where the government has become involved to the extent as it has in this case. Whatever the rule may be in solicitation cases, this is not such a case and the government cannot make it so. In the court below, the government attempted to rely upon language contained in *Sorrells* to state that the defense of entrapment was foreclosed in this type of case. In *Sorrells*, the court stated at 287 U.S. at 435, "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." Each and every case cited in support of that proposition, however, was a solicitation case and thus really does not advance the Government's cause at all. *Grimm v. United States*, 156 U.S. 604, was a prosecution for mailing an obscene picture through the mail, where the picture was solicited by a decoy letter sent by a government agent. *Goode v. United States*, 159 U.S. 663, involved the conviction for embezzlement and theft of mail by a mailman, where the letter containing the money was a decoy. *Rosen v. United States*, 161 U.S. 29, was likewise a prosecution for mailing of obscene material, where the objectionable mailing was sent in reply to a decoy solicitation letter.

Likewise was *Andrews v. United States*, 162 U.S. 420, *Price v. United States*, 165 U.S. 311 and *Bates v. United States*, 10 Fed. 92. *United States v. Reisenweber*, 288 Fed. 520, was a prohibition case where a restaurant was prosecuted as a common nuisance and the evidence for the crime was provided by policemen who frequented the restaurant. Finally, *Aultman v. United States*, 289 Fed. 251 involved prosecution for the unlawful importation of cocaine and morphine. In that case, the informer and the government agent solicited and induced the importation. There is no case holding that where the government becomes so involved in crime as to be the *sine qua non*, that the defendant cannot raise the issue of entrapment, regardless of his predisposition. It would completely free any law enforcement officer to do whatever he wished to make any person commit a crime regardless of predisposition. For, if this Court sanctions the type of conduct undertaken by the undercover agent in this case, there is nothing further that agents need, and the defense of entrapment will be effectively eliminated. When the government agents can provide with impunity the necessary elements to complete the crime, there is nothing further that remains. The respondent does not believe that to be the law.

III.

THE UNDERLYING RATIONALE FOR ENTRAPMENT REQUIRES FOCUSING ON THE CONDUCT OF THE GOVERNMENT

Should the court view the facts of this case as giving rise to the traditional entrapment case, it is then appropriate to examine the underlying rationale for the defense. As noted, this problem has divided this Court in the cases heretofore raising the issue. In *Sorrells v. United*

States, 287 U.S. 435, the majority concluded at page 448:

> "We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them."

Thus, the majority viewed the question as one of statutory interpretation and fashioned its answer on an intent that no Congress has ever affirmed or denied. This view was reaffirmed in *Sherman v. United States*, 356 U.S. 369, where, at page 372, Mr. Chief Justice Warren stated, "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."

The concurring opinions viewed the problem somewhat differently. In *Sorrells*, Mr. Justice Roberts, speaking for himself, Mr. Justice Brandeis and Mr. Justice Stone, held that entrapment should be an objective inquiry, focusing on the conduct of the law enforcement officer. "The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court." 287 U.S. at 457. In *Sherman*, four members of this court adopted this approach.

> "The courts refused to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about his conviction cannot be countenanced. 356 U.S. at 380."

In *Lopez v. United States*, 373 U.S. 427, at 434-5, the court stated:

> "The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents. Such conduct, of course, is far different from the permissible strategems involved in the detection and prevention of crime. Thus before the issue of entrapment can fairly be said to have been presented in the criminal prosecution there must have been at least some showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charge." (Emphasis by the Court).

The court in *Lopez* held that regardless of which was the correct view of entrapment that, "... under any theory, entrapment has not been shown as a matter of law. Indeed, the paucity of the showing might well have justified a refusal to instruct the jury at all on entrapment." 373 U.S. 427 at 436.

The respondent respectfully suggests that time has shown the inadequacies of the view of entrapment as espoused by the majority opinions in *Sorrells* and *Sherman* and that the proper understanding of entrapment is articulated by the concurring opinions of Mr. Justice Roberts and Mr. Justice Frankfurter.

There are several reasons why the analysis that focuses solely on the innocence or predisposition of a defendant is inadequate. First of all is the conceptual difficulty. It is recognized that a defendant is not entitled to an entrapment defense if the solicitation, inducement or drug itself is provided by a private citizen; therefore, the moral aspect of the solicitation or furnishing is not the evil nor can the innocence or predisposition of defendant

be relevant. If the inducement or providing is done by a private person, the defense is simply unavailable. The only difference when the solicitation or providing is done by agents of the prosecution is the fact of the supplier's employment—that of a investigative agency or special employee. Under those circumstances, entrapment is available regardless of the view adopted. It must follow then, that the fact of government employment is the important focus, but under the traditional majority view that becomes unimportant.

If the fact of employment is the essential factor then it would seem obvious that the essential focus should be on that factor—the governmental activity—and not on the defendant's "innocence" or lack thereof. This problem has never been resolved by the majority view.

Secondly, focusing on the innocence or predisposition of a defendant has the direct effect of making what is permissible or impermissible depend upon the particular defendant involved, depending upon his predisposition. If the defendant turns out to be "otherwise innocent" the police practice turns out to be impermissible and, therefore, the defendant is not guilty of a crime; on the other hand, if it turns out that the defendant had a predisposition or was not "otherwise innocent", then the police practice of solicitation or whatever it was is appropriate and the defendant is guilty of a new crime. But the respondent believes, as Mr. Justice Frankfurter correctly stated, "Permissible police activity does not vary according to the particular defendant concerned, . . ." *Sherman v. United States*, 356 U.S. at 383.

There is a subsidiary problem to the above difficulty in that it makes a criminal of a person who is in a class of persons who are found to be "predisposed", i.e., those

who harbor an intent to commit an act will be criminals, but those who do not have such an intent will not be, all this determined prior to the commission of the act, as both must concededly subsequently have done to the solicitation, otherwise there would be no prosecution. This status classification runs counter to this Court's opinion in *Robinson v. California*, 370 U.S. 660, which holds that a state could not punish a person for being a narcotics addict.

Additionally, the requirement that a defendant be "otherwise innocent", is completely misleading. Every single defendant who has succumbed to the government solicitations, as indeed they all have otherwise there would be no prosecution, is not innocent as all have committed acts which the Congress has determined to be illegal. That one defendant resisted the government's inducements ten times hardly makes him less predisposed that one who has succumbed immediately. One may be tired, one may need money or not need it, one may be wary, the other unwary, one may take a personal liking or disliking to the soliciting agent; there are many reasons outside of one's desire to commit or not commit a crime all of which are extrinsic to "predisposition" or "innocence", and make such a distinction meaningless.

Additionally, to require a defendant to prove he has no "predisposition" or is "otherwise innocent" under the majority view permits the introduction of all kinds of hearsay, speculation and rumor, all of which is inadmissible in any other context, in order to prove the defendant's "predisposition". While juries are regularly instructed to the contrary, it strains reason to believe that the average juror does not consider such evidence as substantive probing of the defendant's guilt of the actual crime charged, and not simply his "predisposition".

Lastly, permitting juries to speculate about "predisposition" or "otherwise innocence", "Cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that wise administration of criminal justice demands." Mr. Justice Frankfurter concurring in *Sherman v. United States*, 356 U.S. 369 at 385.

On the other hand, adopting the approach espoused by Mr. Justice Roberts and Mr. Justice Frankfurter in their concurring opinions, does not have with it such attendant problems.[5] It permits an objective evaluation

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[5]Both the suggested Proposed New Federal Criminal Code (1971), Final Report of the National Commission on Reform of Federal Criminals Laws, Section 702 and The Model Penal Code, Section 2.13 (Proposed Official Draft, 1962), adopt the objective test outlined by Mr. Justice Roberts and Mr. Justice Frankfurter. Entrapment in Section 702 would occur "when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." The conduct of the government agent squarely fits this definition. He certainly used "means" likely to cause respondent to commit the crime; indeed, he provided the only "means" by which respondent could commit any crime.

Petitioner objects to this proposed test because it "... would seem to confer a wholly gratuitous benefit." (Pet. brief fn. 13, p. 20). Petitioner ignores the fundamental fact that law enforcement officers are likewise subject to the restraints of the law. Petitioner should heed the statement of this Court in *McNabb v. United States*, 318 U.S. 332, 343, where the practice of holding accused persons before taking them before a magistrate was invalidated:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law

by the court in which the inquiry focuses on the conduct of the investigating agents. The basic evil to which the courts are addressing here is the conduct of overzealous law enforcement personnel. It is the age old problem of who is to watch the policeman, so that there can be confidence in the administration of law enforcement. The only way that has ever been found that is effective to restrain the overaggressive law enforcement activity is to block the introduction of the fruits of that activity from admission in the ensuing prosecution. The only entity that can do that is, of course, the trial court. The adoption of the views of the concurring judges will foster that salutory approach.

CONCLUSION

For the above stated reasons, the Court of Appeals was clearly correct and its opinion should be affirmed.

Respectfully submitted,

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December, 1972

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enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience therefore has counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic."